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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 104.

HENRY DALLEMAGNE, CONSUL GENERAL OF THE REPUBLIC OF FRANCE, APPELLANT,

vs.

JEAN FRANCOIS MOISAN, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANT.

WALTER V. R. BERRY.
BENJAMIN S. MINOR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13848

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BRIEF FOR APPELLANT.

This is an appeal by Henry Dallemagne, consul general of the Republic of France at San Francisco and intervenor on behalf of the Republic of France in the matter of the application of Jean Francois Moisan, a French sailor, for a writ of *habeas corpus*, from the order and judgment of the district court of the United States for the northern district of California, entered on the 28th day of May, 1903, discharging said Moisan from the custody of the chief of police of San Francisco.

STATEMENT OF THE CASE.

On May 1, 1903, Henry Dallemagne, consul general of the French Republic in the city of San Francisco, State of California, in pursuance of the provisions of article VIII of the consular convention of 1853 between the United States and France, made a requisition in writing for the arrest and detention of Jean Francois Moisan, a member of the crew of the French bark "Jacques," lying in the harbor of San Francisco, said requisition being directed and delivered to George W. Wittman, the chief of police of the city of San Francisco, as follows:

> "CONSULAT DE FRANCE, SAN FRANCISCO,
> "SAN FRANCISCO, *1st Mai*, 1903.
>
> "To GEORGE W. WITTMAN, Esq., *Chief of Police, Hall of Justice, San Francisco, California.*
>
> "DEAR SIR: Jean Francois Moisan, a member of the crew of the French bark 'Jacques,' whereof Louis M. Michel is master, having conducted himself in an improper and insubordinate manner on board, I have the honor, in pursuance of the provisions of the terms of article 8 of the consular convention of 1853, between France and the United States, to request that you will please cause the said Jean Francois Moisan to be arrested, brought on shore and imprisoned until I find an opportunity of sending him away. An official abstract from the crew list is hereby annexed. The expenses of such arrest and detention to be paid by me.
>
> "I have the honor to be, dear sir, very truly yours,
> "[SEAL.] HENRY DALLEMAGNE,
> *French Consul General.*"

Accompanying this requisition the consul general delivered to George W. Wittman an official abstract, translated into English, from the ship's roll of the French bark "Jacques," Capt. Louis M. Michel, lying in the harbor of San Francisco. This abstract showed Moisan to be a mem-

ber of the crew of the bark "Jacques," and was made in accordance with the provisions of article VIII of the consular convention between the United States and France, of February 23, 1853.

On the same day, pursuant to the request in this requisition, and acting on the authority of this requisition George W. Wittman, as chief of police, arrested said Moisan and confined him in the city prison of San Francisco.

Shortly after the arrest of Moisan the bark "Jacques" left the port of San Francisco.

On the 28th day of May, 1903, Jean Francois Moisan made an application to the district court of the United States in and for the northern district of California for a writ of *habeas corpus*, alleging that neither the consul general of France nor the chief of police had jurisdiction to restrain him from his liberty and to imprison him as stated.

On the same day the chief of police, acting in obedience to the writ of *habeas corpus* issued by said court, produced the body of Jean Francois Moisan, showing that said Moisan was in his custody by virtue of a written request from Henry Dallemagne, the French consul general of San Francisco, and by virtue of an official abstract from the roll of the French bark "Jacques," copies of said request and abstract being made a part of the return to the writ of *habeas corpus*.

The matter thereupon came on regularly for hearing before the Hon. John J. De Haven, judge of the district court of the United States for the northern district of California. After due consideration of the matter, and it appearing to the court that the bark "Jacques," of the crew of which Jean Francois Moisan was a member, *had departed the port of San Francisco and was no longer in that port*, it was ordered that Jean Francois Moisan be discharged from the custody whence produced.

The execution of said judgment of discharge was stayed for the term of one day.

On the same day Henry Dallemagne, consul general of France, intervening, submitted as follows:

> "That the complainant in this case was arrested at intervenor's request, under and by virtue of article VIII of the consular convention between the United States and France, concluded on the 23d day of February, A. D. 1853, and proclaimed by the President of the United States on the 12th day of August, A. D. 1853, and now in full force and effect.
>
> "That a difference has arisen in the port of San Francisco, between the captain of the French bark 'Jacques' and the complainant in this matter, a member of the crew of said bark, and that said complainant's arrest was made by virtue of intervenor's exclusive cognizance of such differences under said article of said treaty."

And thereupon the said Henry Dallemagne made a petition for an appeal as follows:

> "Henry Dallemagne, consul general of the Republic of France, acting for and on behalf of the Republic of France, resident at San Francisco, conceiving that he is aggrieved by the order and judgment, entered on the 28th day of May, 1903, in the above-entitled proceeding, does hereby appeal from the said order to the Supreme Court of the United States and prays that his appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States."

On the same day Judge De Haven ordered that said appeal be allowed as prayed for; and further ordered that Jean Francois Moisan be enlarged upon executing a recognizance, with sureties, for his presence to answer the judgment of Supreme Court; or, upon failure to get bail, to remain in the custody of the United States marshal for the northern district of California.

On the same day Moisan gave a satisfactory recognizance with sureties, and was duly enlarged to await the judgment of the Supreme Court.

ASSIGNMENTS OF ERROR.

1. The court erred in holding that the application must be granted for the reason that the vessel to which Jean Francois Moison belonged as a member of the crew had left the port of San Franciso.

2. The court erred in its construction of article VIII of the treaty between the United States and France of 1853, in holding that it had jurisdiction of the application herein.

3. The court erred in granting the writ of *habeas corpus*.

4. The court erred in not remanding the prisoner to custody.

5. The court erred in discharging the prisoner from custody.

ARGUMENT.

The requisition by the French consul general at San Francisco upon the chief of police for the arrest and detention of Jean Francois Moisan was made in pursuance of article VIII of the consular convention between the United States of America and His Majesty the Emperor of the French, concluded on February 23, 1853; ratified by the United States on April 1, 1853; exchanged on August 11, 1853, and proclaimed by the United States on August 12, 1853 (10 U. S. Statutes at Large, p. 997).

This consular convention (which was made in the English and French languages) is still in full force and effect.

Article VIII of said convention is as follows:

ARTICLE VIII.

"The respective consuls general, consuls, vice-consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

ARTICLE VIII.

"Les consuls généraux, consuls, vice-consuls, ou agents consulaires respectifs seront exclusivement chargés de l'ordre intérieur à bord des navires de commerce de leur nation et connaitront seuls de tous les différents qui se seront élevés en mer ou s'élèveront dans les ports, entre le capitaine, les officers et les hommes inscrits sur le rôle d'équipage, à quelque titre que ce soit, particulièrement pour le réglement des salaires et l'exécution des engagements réciproquement consentis; les autorités locales ne pourront s'immiscer à aucun titre dans ces différents, et devront prêter main forte aux consuls, lors qu'ils la requerront, pour faire arrêter et conduire en prison ceux des individus inscrits sur le rôle d'équipage, à quelque titre que ce soit, qu'ils jugeront à propos d'y envoyer. Ces individus seront arrêtés sur la seule demande des consuls adressée par écrit à l'autorité locale et appuyée d'un extrait officiel du registre de bord ou rôle d'équipage et seront tenus, pendant tout le temps de leur séjour dans le port, à la disposition des consuls. Leur mise en liberté s'effectuera sur une simple demande des consuls faite par écrit. Les frais occasionnés par l'arrestation et la détention de ces individus seront payés par les consuls."

In the order of De Haven, J., discharging Moisan from custody, it is recited as follows:

> "The matter was thereupon argued * * * and submitted to the court for decision. After due consideration had thereon, and it appearing to the court that the bark 'Jacques,' of the crew of which said Jean Francois Moisan was a member, has departed the port of San Francisco and is no longer in said port,—it is ordered that the said Jean Francois Moisan be, and he is hereby discharged from the custody whence produced, and that he go hence without day."

The sole reason for the discharge of Moisan by De Haven, J., was that the bark "Jacques," of the crew of which the said Moisan was a member, had departed from the port of San Francisco; that is to say, the court below, construing and interpreting article VIII of the consular convention, declared that, in the following sentence of said article, the word "*their*" refers *not* to persons composing the crew, but to the *ship* itself, and that a sailor can be detained by the local authority, acting at the request of a consul, only during the time of the *ship's* "stay in the port."

The sentence thus construed and interpreted is as follows:

> "Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of *their* stay in the port, at the disposal of the consuls."

Such a construction seems so extraordinary, not only from a grammatical point of view, but from that of the plain wording and the evident intent of the makers of the convention, that it would seem that no argument were necessary in refutation.

In the preceding sentence of the article it is declared that the local authorities shall lend forcible aid to the consuls to arrest and imprison "*all persons composing the crew*" whom

they may deem it necessary to confine. The article then proceeds:

> "*Those persons* (that is, all persons composing the crew) shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and *shall* (that is, *those persons* shall) be held during the whole time of *their* (that is, *those persons*) stay in the port at the disposal of the consuls. *Their* (that is, *those persons*) release shall be granted at the mere request of the consuls made in writing."

If the construction of De Haven, J., were correct and the word "*their*," in the first sentence just quoted, could possibly refer to the word *ship*, then the word "Their," beginning the second sentence just quoted, must also necessarily refer to the word *ship*, which would be an added nonsense.

Turning to the French side of the convention, we find that in the French language (always lucid and accurate in expression) the reading is as follows:

> "Ces individus seront arrêtés sur la seule demande des consuls addressée par écrit à l'autorité locale et appuyée d'un extrait officiel du registre de bord ou rôle d'équipage et seront tenus, pendant tout le temps de leur séjour dans le port, à la disposition des consuls."

To any one familiar with the French language, it is abundantly clear that the word *leur* cannot possibly refer to *registre de bord* or *rôle d'équipage*, but must refer only to *individus*.

Except by reading into this convention words which do not exist there, or by reading *out* of it the clear, unambiguous expression, made in both languages, it is plain that the meaning is that persons composing the crew should, when it becomes necessary to confine them, be detained during the stay of such persons in the port.

If the interpretation of article VIII made by the judge below were correct, it would be almost impossible for the consular authority to maintain order on board the many hundreds of French vessels which enter the port of San Francisco every year, not to speak of the many thousands which enter the various other ports throughout the United States.

Let us suppose that a member of the crew of a French vessel, which is on the point of leaving the port of San Francisco, becomes guilty of an act of insubordination or mutiny, or any other act affecting the internal order or discipline of the ship. The master applies to the French consul, who causes the mutinous sailor to be arrested in accordance with the terms of article VIII. Under the construction made by De Haven, J., if the ship thereupon continues its voyage, the prisoner must be *immediately* released from custody. Under such circumstances, insubordination, mutiny, etc., would be of daily occurrence on the part of sailors who, tired of their ship and of their contract, want an excuse for being set free in San Francisco.

One of the reasons for which article VIII was drawn is that a sailor who has been guilty of insubordination, mutiny, etc., instead of being held a prisoner on his ship for a period of possibly many months, while the vessel continues its voyage, should be sent back by the consul to France or to the United States, as the case may be, at the earliest possible moment, by the first ship sailing homeward from the port of arrest, in order to be duly tried under the laws of his own country.

Let us suppose that a sailor on a French ship lying in the harbor of San Francisco should be put in irons and imprisoned in the hold by the master on account of an act of insubordination or mutiny, or any other act not affecting the tranquillity of the port. Could it be maintained that the master would not have the right to keep such sailor thus imprisoned until the return of the ship to France? Such

return, in case the ship is continuing on a long cruise, might not be for many months; whereas, if such sailor were arrested in accordance with the terms of article VIII, the consul could have him returned to France by the first ship sailing homeward, and there tried for his acts long before his own vessel could have reached home.

From the earliest historical period, the contract of a sailor has been treated as an exceptional one, involving, to a certain extent, the surrender of his personal liberty during the life of the contract (Robertson *vs.* Baldwin, 165 U. S., 275, 281–283). It has also come to be generally understood among civilized nations that all matters of discipline and things done on board which affect only the vessel or those belonging to it, not involving the peace and dignity of the country or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belongs, as the laws of that nation or the interests of its commerce should require (Wildenhus's case,* 120 U. S., 1, 12, 15). It is upon such bases as these that consular jurisdiction is reciprocally granted in the treaties between the United States and various foreign nations, including the jurisdiction granted by article VIII of the consular convention between the United States and France.

The terms of article VIII were framed not only for the benefit of international commerce, but also for the benefit of the sailor himself, who, instead of being kept in irons in the ship's hold and possibly maltreated, is arrested on the consular requisition, and afterwards either returned to his ship (if expedient) or returned as soon as possible by another ship to his own country, there to be tried; or, under the laws of the United States, he is set at liberty, not again to be arrested for the same cause, after a detention of two months (R. S. U. S., 4081).

* Article VIII of the French convention in question is quoted in full on page 15 of the Wildenhus case.

It was suggested by counsel for the appellee in the court below (though the point was not argued or passed upon by said court) that the consular requisition for the arrest of a sailor should be made, *not* to the police authorities, but to the United States courts. It is wholly immaterial to the appellant and to the government he represents whether the persons whose detention is requested by French consuls be arrested by the local police or through the Federal authorities. In the present case the French consul in San Francisco addressed his request for the arrest of the mutinous sailor to the police authorities, thus acting in a manner which has been constant, uniform, and unquestioned in the United States for over a half a century, and in the same manner that United States consuls in France act today and have acted for fifty years, when they request the imprisonment of American sailors in the ports of France. (See Appendix.)

It is in every way as satisfactory for French consuls in the United States to make applications for arrest, under this convention, to the United States courts as to the police authorities. If the custom of applying to the police authorities—a custom which has been in practice both in the United States and France for fifty years—is erroneous, the appellant is the first to desire to be informed thereof, in order that he may adopt a correct form of procedure. What he does emphatically insist upon, however, is that the construction or interpretation of the wording of the convention given by De Haven, J., to the effect that an insubordinate sailor arrested by consular request can be detained only during *the ship's stay in the port*, is erroneous, being directly in opposition to the clear, unequivocal, positive words of the convention. So plain is this wording that there is little wonder that for so many years, both in the United States and France, no controversy had arisen in regard thereto. Prisoners arrested under this article in either country have always been detained, whether their ships had left the port of arrest or not, until such prisoners could be returned to

their ships, or returned to their countries by other ships, or put at liberty. It is only lately that the meaning of "*their stay in the port*" has been questioned, and it is this point that the appellant and the government he represents are urgently desirous of having determined by the Supreme Court of the United States.

The outcome is of high importance not only to French consuls in the United States, but to United States consuls in France, for, naturally, if French sailors detained under consular requisition in the United States are to be set free the instant their ships leave port, the French authorities will, under like circumstances, turn loose American sailors who are detained by consular requisition in the ports of France.

Such a result would be to put a premium on insubordination, mutiny, and desertion on the part of sailors of both countries.

The wording of article VIII is so definite and precise that the construction put upon it by the judge below may justly be regarded as indicating a purpose to change the highest law of the land by judicial action. The appellant maintains that the language of the article is so plain and unambiguous that there is no room for interpretation or construction.

> "If the language of the instrument is plain and unambiguous in itself, there is no room for interpretation or construction."
>
> "Interpretation and Construction," 17 A. & E. Cyclo. of Law, p. 4 (cases).

> "If the words of a treaty express the meaning clearly, there should be no other means of interpretation employed."
>
> "Treaties," 28 A. & E. Cyclo. of Law, p. 489.

> "Vattel says that it is not allowable to interpret what has no need of interpretation. If the meaning be evident and the conclusion be not absurd, you have no right to look beyond or beneath it, to alter or add to it by conjecture. Wolff observes that to do so is to remove all certainty from human transactions."
>
> 2 Phillimore, International Law, sec. 70.

"It is not allowable to interpret what has no need of interpretation, for when a treaty is conceived in clear and precise terms, and the sense is manifest, and leads to no absurdity, there can be no reason for refusing the sense which is naturally presented and manifested."

1 Halleck, International Law, p. 297 (ch. VIII, sec. 39).

"La première maxime générale sur l'interprétation est qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation. Quand un acte est conçu en termes clairs et précis, quand le sens en est manifeste et ne conduit à rien d'absurde, on n'a aucune raison de se refuser au sens que cet acte présente naturellement. Aller chercher ailleurs des conjectures pour le restreindre ou pour l'étendre, c'est vouloir l'éluder. Admettez une fois cette dangereuse méthode, il n'est aucun acte qu'elle ne rende inutile. Que la lumière brille dans toutes les dispositions de votre acte, qu'il soit conçu dans les termes les plus précis et les plus clairs, tout cela vous sera inutile, s'il est permis de chercher des raisons étrangères pour soutenir qu'on ne peut le prendre dans le sens qu'il présente naturellement."

2 Vattel "LeDroit des Gens," sec. 263.

"Les traités, étant essentiellement des contrats de bonne foi (actus bonæ fidei), doivent avant tout s'interpréter dans le sens de l'équité et du droit strict. Lorsqu'il n'y a aucune ambiguité dans les mots, que la signification est évidente et ne conduit pas à des résultats contraires à la saine raison, on n'a pas le droit d'en fausser le sens et la portée pratique par des arguties et des conjectures plus ou moins plausibles."

Calvo "Le Droit International," sec. 1650.

"In construing the language of treaties, the courts will adopt the same general rules which are applicable in the construction of statutes, contracts and written instruments generally."

"Treaties," 28 A. & E. Cyclo. of Law, p. 488.

"When the language used in a statute is plain and unambiguous, a refusal to recognize its natural obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action."

Bate Refrigerating Co. *vs.* Sulzberger, 157 U. S., 1.

"Where the meaning is plain, the letter controls."

"Statutes," 26 A. & E. Cyclo. of Law, p. 598.

"This particular convention being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. * * * It is said by Chancellor Kent in his Commentaries (vol. 1, p. 174): 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.'"

Tucker *vs.* Alexandroff (the "Variag" case), 183 U. S., 424, 437.

It is a canon of interpretation that a treaty should be carried out in a spirit of *uberrima fides* and construed so as to give effect to the object designed (*In re* Ross, 140 U. S., 453, 475). The court should find an interpretation, if it can be done, which will involve no violation of the pledged faith of the Government of the United States to the government of another country, and should give that interpretation without hesitation (Ropes *vs.* Clinch, 8 Blatch., 304, 308).

The appellant, relying upon the integrity of this convention, respectfully asks that the action and order of the district court for the northern district of California in granting the writ of *habeas corpus* be reversed.

Respectfully submitted.

WALTER V. R. BERRY.
BENJAMIN S. MINOR.

APPENDIX.

CONSULAR REGULATIONS OF THE UNITED STATES (1896), P. 723.

APPENDIX No. VI.

FORM No. 31.

Request to Local Authorities to Imprison Seamen or Mariners.

(Paragraphs 299, 320, and 353.)

CNSULATE OF THE UNITED STATES OF AMERICA AT ——,

——, 189–.

SIR: —— ——, —— ——, and —— ——, part of the crew of the —— of ——, whereof —— —— is master, recently arrived in this port from ——, having conducted themselves in an improper and insubordinate manner on board, and positively refused to do duty, I have the honor respectfully to request that you will please cause the said named persons to be arrested, brought on shore, and imprisoned until I can find it expedient to give them their liberty.

I have the honor to be, sir, your obedient servant,

—— ——,

U. S. Consul.

To —— ——,

Captain [*or other authorities of the port*].

Walter V. R. Berry. Benjamin S. Minor.
Hugh B. Rowland.

Berry & Minor, attorneys-at-law, Colorado building, 14th and G streets N. W., Washington, D. C.

Telephone: Main 2151.
Cable address: Bermin, Washington.

OCTOBER 15TH, 1904.

W. J. CARR, Esq.,
Chief of the Consular Bureau,
Department of State, Washington, D. C.

DEAR SIR: Referring to the Consular Regulations of 1896, Appendix No. VI, form No. 31, which contain instructions regarding the imprisonment of American seamen in France at the request of American consular officers, will you kindly let me know what is meant by the term "local authorities" therein contained.

Thanking you in advance for this information,
Very truly yours, WALTER V. R. BERRY.

Consular
K.

DEPARTMENT OF STATE,
WASHINGTON, *October* 18, 1904.

WALTER V. R. BERRY, Esquire,
Colorado Building, Washington, D. C.

DEAR SIR: In reply to your letter of the 15th instant I have to say that the term "local authorities" used in form No. 31, page 723 of the Consular Regulations of 1896, is regarded as meaning "police authorities" or "gendarmerie," when used in connection with the arrest or imprisonment of American seamen in France.

Very truly yours, W. J. CARR,
Chief Consular Bureau.